

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Pulaski, Tennessee))

MM Docket No. ____-____
RM No. ____

To: Chief, Allocations Branch
Mass Media Bureau

OPPOSITION TO REQUEST FOR WAIVER OF PROCEDURAL POLICY

Big River Broadcasting Corporation ("Big River"), licensee of WQLT-FM, WSBM and WXFL(FM), Florence, Alabama, herewith opposes the January 17, 1997, "Request for Waiver of Procedural Policy", filed by D. Mitchell Self Broadcasting, Inc. ("Self"). In support, the following is shown:

1. Big River sets forth background information about this proceeding in Appendix A hereto. This information has been presented elsewhere several times and is included here for the record.

2. Big River opposes Self's request, primarily because it appears that Self is trying to maintain totally inconsistent and conflicting positions. It argues that Big River has tendered a "contingent" application, which should be dismissed. Yet, it maintains that it should be allowed to tender

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a "contingent" petition for rulemaking, even though it admits that it violates the Commissions rules and policy.

3. The only reasons advanced by Self in support of its waiver request are purely private matters and have no public interest merit whatsoever.

4. Moreover, Self's waiver request is based on a factually incorrect predicate. Self hypothesizes that Big River and H-M-S Broadcasting Co. might retender their respective applications for modification of WXFL(FM) and WDXE-FM, Lawrenceburg, TN. However, the fact of the matter is that the Big River and H-M-S applications are still "pending" before the Commission, under Section 1.65 of the Rules and Regulations. Furthermore, Big River and H-M-S have requested reconsideration of the dismissal of those applications, and therefore seek to maintain the original filing date of their applications.

5. Finally, if Self continues to prevail in its efforts to secure the dismissal of the WDXE-FM and WXFL-FM applications, then its Pulaski proposal will lack viability, because there will be no downgrade of WQLT-FM. However, if Big River and H-M-S prevail in securing reversal of the dismissal of the WDXE-FM and WXFL-FM applications, then Self's Pulaski proposal will still lack viability, because it would be "cut-off" by the tendering of the applications consistent with the FCC's one-step application procedures. Therefore, there is no reason for the Pulaski petition to remain on file any longer, and this

delaying tactic, and continued denial of a net gain radio service to 193,000 persons, should be promptly and swiftly concluded.

WHEREFORE, Big River requests that the Chief deny Self's motion and dismiss the petition for rulemaking promptly.

Respectfully Submitted,

BIG RIVER BROADCASTING CORP.

by Harold K. McCombs
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Its Attorney

January 28, 1997

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APPENDIX A

BACKGROUND

1. On March 22, 1996, Big River and H-M-S Broadcasting Co. ("H-M-S"), licensee of WDXE-FM, Lawrenceburg, Tennessee, tendered simultaneously the following three FCC Form 301 applications for construction permits for minor modification of the WQLT-FM, WDXE-FM, and WXFL-FM facilities:

WQLT-FM, Florence, AL	File No. BPH-960322ID
WDXE-FM, Lawrenceburg, TN	File No. BPH-960322IB
WXFL(FM), Florence, AL	File No. BPH-960322IF.

The three applications were submitted as a package, and they were accepted for filing by the Commission. The applications, collectively, provide for the downgrade of WQLT-FM from Channel 297C to Channel 297C1; the modification of WDXE-FM from Channel 240A to Channel 294A (which would permit WDXE-FM to increase facilities to full Class A status), and the upgrade of WXFL-FM from Channel 241A to Channel 241C2. The net effect of the three applications is an increase in service to over 193,000 additional persons.

2. Originally, prior to the filing of the three Form 301 applications, the FCC staff had indicated that they would process and grant the WQLT-FM and WDXE-FM applications concurrently. Then, upon tender of the FCC Form 302-FM applications for license, the Commission would complete processing of the WXFL-FM application.

3. Instead, the Commission granted the WQLT-FM application for construction permit and advised that once Big River filed an FCC Form 302-FM application for license to cover the WQLT-FM construction permit, then the Commission would grant simultaneously the WQLT-FM license application, the WDXE-FM application for CP, and the WXFL-FM application for CP.

4. Big River reduced power, consistent with the terms of the WQLT-FM construction permit and consistent with the staff instructions. Big River tendered an application for license (File No. BLH-960617KA).

5. Thereafter, on June 26, 1996, Self, licensee of WSHK(FM), Russellville, AL and of WLAY-AM-FM, Muscle Shoals, Alabama, filed an "Informal Objection" against the WDXE-FM and WXFL-FM applications. Self's three broadcast stations -- WSHK-FM, WLAY, and WLAY-FM -- are direct competitors with Big River's stations. Thus, Self has a private interest in preventing the upgrade of WXFL(FM) and wide-area expansion of its service area, while trying to lock-in the downgrade of WQLT-FM.

6. Concurrently, Self tendered on June 26, 1996, a "Petition for Rulemaking" proposing the allotment of Channel 294A at Pulaski, Tennessee. That Pulaski Petition presumed the final downgrade of WQLT-FM from Channel 297C to Channel 297C1 and conflicted with the prior-filed application for modification of

WDXE-FM to operate on Channel 294A. The Pulaski Petition was defective when filed.¹

7. By letter dated November 26, 1996, (Ref. No. 1800B3-DEB/PHD), the Commission staff dismissed the WDXE-FM and WXFL-FM applications for construction permits, reversing its prior position and maintaining that the applications were "contingent" in violation of Section 73.3517 of the Rules and Regulations. The last sentence of the letter states "Big River Broadcasting Corporation's application for a covering Class C1 license for WQLT-FM is retained in pending status."

8. Big River and H-M-S sought timely administrative reconsideration of the dismissal of the WDXE-FM and WXFL-FM

Self's "Petition For Rulemaking" violates Section 73.208(a)(3)(iii) of the Rules and Regulations, because it was filed after the date of receipt of the WDXE-FM application. Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments (MM Docket No. 91-348), 7 FCC Rcd. 4917, 70 RR 2d 1641 (1992), reconsideration, 8 FCC Rcd. 4743, 73 RR 2d 222 (1993). Therefore, Commission policy requires dismissal of Self's June 26, 1996, "Petition For Rulemaking" as defective. The Commission concluded in MM Docket No. 91-348 that "we are of the view that FM applications should receive protection from conflicting rulemaking proposals at the same time that they receive such protection from other mutually exclusive applications." Id., 7 FCC Rcd. at 4919, 70 RR 2d at 1644. Accordingly, the Commission concluded that minor change applications, such as those filed by Big River and H-M-S, "will be protected from conflicting rulemaking proposals on the date they are received at the Commission." Id. Moreover, under Section 1.65(a) of the FCC Rules and Regulations, the WDXE-FM and WXFL-FM applications remain "pending" before the Commission "until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court."

applications and requested reinstatement and grant of the WDXE-FM and WXFL-FM applications. Alternatively, they requested waiver of Section 73.3517 of the Rules.

9. The Commission staff indicated to Big River that if Big River allowed the WQLT-FM license application to remain pending, then the Commission could grant it at any time, thereby permanently downgrading WQLT-FM. The staff also indicated that the Commission might grant the WQLT-FM license application even if Big River were to request that the Commission continue to hold the license application in pending status until final resolution of the litigation over the dismissal of WDXE-FM and WXFL-FM CP applications. Thus, to insure that WQLT-FM remains a Class C station during the pendency of the litigation, Big River had no choice but to dismiss the WQLT-FM license application, and it did so.

10. Big River did NOT, indeed could NOT, however, return the WQLT-FM construction permit BPH-960322ID for cancellation. If the construction permit were canceled, then the Commission could not grant the relief requested in the petition for reconsideration. The construction permit is still outstanding. It expires December 14, 1997. Big River will seek extension of that construction permit if the litigation has not terminated by final order before that date. If the order dismissing the WDXE-FM and WXFL-FM applications becomes a final

order, then Big River will return the WQLT-FM construction permit for cancellation.

11. Big River has returned WQLT-FM to its full Class C licensed power level.

CERTIFICATE OF SERVICE

I, Harold K. McCombs, Jr., do hereby certify that I have caused to be served by mail, First Class postage prepaid, this 28th day of January, 1997, copies of the foregoing "Opposition to Request for Waiver of Procedural Policy" on the following persons:

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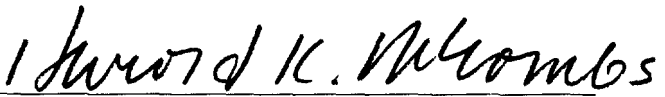
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